



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNR, MNDC, MNSD, FF

Introduction

This conference call hearing was convened in response to two applications for dispute resolution as follows:

By the tenant: as an application for the return of double the amount of the security deposit; and to recover the filing fee associated with this application.

By the landlord: as an application for a Monetary Order for damage to the unit; for money owed or compensation for damage or loss under the Act, Regulation or tenancy agreement; for unpaid rent or utilities; and to recover the filing fee associated with his application.

Both parties attended the hearing and provided affirmed testimony. They were given a full opportunity to be heard, to present evidence and to make submissions.

Issue(s) to be Decided

Is the tenant entitled to the return of the security deposit as claimed?

Is the tenant entitled to recover the filing fee?

Is the landlord entitled to a Monetary Order, and if so for what amount?

Is the landlord entitled to keep all or part of the security deposit?

Is the landlord entitled to recover the filing fee?

Background and Evidence

The rental unit consists of the lower level of a single detached home. Pursuant to a written agreement, the fixed term tenancy was based on a one year lease, starting on October 1st, 2010 and ending September 30th, 2011 at a rate of \$1300.00 per month. The tenant paid a security deposit of \$600.00 and was responsible for 40% of the utilities. Condition inspection reports were not completed at the start or the end of the tenancy.

In his documentary evidence, the landlord produced a copy of a notice to end tenancy from the tenant dated March 9th, 2010, with an effective date of April 30th, 2011. In that same notice, the tenant states that if the landlord cannot find a new tenant by the end of April 2011, the tenant will continue to pay the rent until the end of the lease contract. The landlord provided a copy of the notice of the tenant's forwarding address, which the landlord states he received on June 1st, 2011.

The landlord testified that the rental unit was re-rented on May 1st, 2011 at a reduced rate of \$1250.00 per month and claims the loss of rental income of \$50.00 per month for the remainder of the un-expired term of the tenancy. The landlord said that he used a leasing agent to find new tenants and is charging the tenant the agent's fee of \$260.42. The landlord also provided copies of utility invoices for April 2011, and copy of an invoice to repair a bathroom fan.

The landlord filed a monetary claim as follows:

- Loss of rental income (\$50.00 x 5mths):	\$ 250.00
- Lease agent's fee:	\$ 260.42
- Replace bathroom fan:	\$ 145.60
- Unpaid hydro:	\$ 43.49
- Sub-total:	\$ 699.91
- Less \$600.00 security deposit:	\$ 600.00

- Balance owing to the landlord: \$ 99.91

The landlord stated that he originally calculated deductions for loss and damages at the end of the tenancy, and that at that time he found that he owed the tenant \$45.99 after retaining the tenant's \$600.00 security deposit. The landlord provided a copy of the cheque dated May 31st, 2011, showing that he paid the tenant for that amount.

The tenant testified that he did not intend to sign a fixed term agreement but that he nevertheless signed it due to language barriers. He stated that if the landlord would have told him that he would be charged for the cost of finding new tenants, he would have found new tenants himself. He also stated that he did not agree that he would pay the difference of the reduced rent for the remainder of the fixed term. Concerning hydro, he said that he told the landlord's daughter, who acted as an agent, that he paid the full invoice for March in order to be unregistered with Hydro and not have to pay for April; he said that the landlord's daughter agreed to that arrangement. Concerning the broken bathroom fan, the tenant said that no inspection reports were completed in spite of his request, and that the fan was already broken at the start of the tenancy.

Analysis

Section 38(1) of the *Residential Tenancy Act* provides that the landlord must return the security deposit or apply for dispute resolution within 15 days after the later of the end of the tenancy and the date the landlord received the tenant's forwarding address in writing.

Section 38(6) of the *Residential Tenancy Act* provides in part that if a landlord does not comply with his statutory obligation to return the security deposit within 15 days, the landlord must pay the tenant double the amount of the deposit.

In this matter the landlord retained an amount from the security deposit without the tenant's written agreement as required by the Act; the landlord was not entitled to do

this. The landlord stated that he received the tenant's forwarding address in writing on June 1st, 2011. Therefore the landlord had to either return the full deposit or make an application for dispute resolution by no later than June 16th, 2011. The landlord did not file his application until August 3rd, 2011. Accordingly the tenant is entitled to the return of double the amount of the security deposit for \$1200.00.

Turning to the landlord's claim: before a Dispute Resolution Officer can make an order under section 67 of the *Residential Tenancy Act*, the applicant must first prove the existence of damage or loss; that it stemmed from the other party's violation of the Act, regulation, or tenancy agreement; that the monetary amount of the claim was verified; and that the applicant took steps to mitigate or minimize the loss or damage. When these requirements are not satisfied, and particularly when the parties' testimonies are at odds, in the absence of other substantive independent evidence the burden of proof is not met. In this matter that burden was on the landlord to prove his claim against the tenant. Concerning the broken fan, in the absence of evidence as noted above I dismiss this aspect of the landlord's claim.

Section 45(2) of the *Residential Tenancy Act* states in part that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than the date specified in the tenancy agreement as the end of the tenancy.

The tenancy agreement is a contract of adhesion drawn by the landlord. If the tenant wished to rent from the landlord under any other terms than those specified in the agreement, he ought not to have signed the agreement. Once signed, the tenant is obliged to accept the terms of the agreement without modification. I find that the tenant breached the fixed term agreement by ending the tenancy prematurely on April 30th, 2011. Section 7(2) of the *Act* states in part that a landlord who claims for compensation for damage must do whatever is reasonable to minimize the damage or loss. The landlord did this by finding new tenants starting May 1st, 2011 at a reduced rent of \$50.00 per month. I find that the landlord is entitled to compensation for the difference between what he would have received from the defaulting tenant and what he was able

to re-rent the unit for the balance of the fixed term. Therefore I grant the landlord his claim for \$250.00.

Concerning the leasing agent's fee of \$260.42, this is a fee that the landlord would have had to pay to find new tenants at the end of the tenancy. Further, I found no provisions under the tenancy agreement that put the tenant on notice that the landlord intended to make such a claim if the tenant breached the agreement. Therefore I dismiss this aspect of the landlord's claim.

Concerning the utility charges, I find that the tenant made different verbal arrangements from those set out in the tenancy agreement with the upstairs tenants, and then relayed these arrangements to the landlord's daughter. The landlord did not receive that information; in his documentary evidence, the landlord's statement indicates that he was trying to find the tenant in order to reconcile utilities for April. I find that the tenant was not properly informed by the tenant and I award the landlord recovery of \$43.49 for unpaid utilities.

Conclusion

The tenant established a claim of \$1200.00 for the return of his security deposit, of which the landlord paid \$45.99 for a balance of \$1154.01. Under his application the landlord established a claim of \$293.49.

I decline to make an order regarding the filing fees and each party will assume responsibility for the costs associated with their application.

Pursuant to Section 72 of the Act, I set off the amount awarded to the landlord against the amount awarded to the tenant, and I grant the tenant a Monetary Order for the balance of \$860.52

This Order may be registered in the Small Claims Court and enforced as an order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: October 20, 2011.

Residential Tenancy Branch